

Date: July 28, 1997

Case No.: 95-INA-117

In the Matter of:

COSMO'S MODEL & TALENT, INC.,
Employer

On Behalf Of:

MAUREEN LYNDA-GRAY HICKMAN,
Alien

Appearance: Marshall G. Whitehead, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On December 14, 1992, Cosmos Model & Talent, Inc. ("Employer"), filed an application for labor certification to enable Maureen Lynda-Gray Hickman ("Alien") to fill the position of Administrative Analyst (AF 268-269). The job duties for the position are:

Establish and manage all administrative functions of business including personnel, accounting, finance and computer systems in support of company operations. Assist talent director in organizing and running client workshops, interviews, training sessions, and rehearsals. Assist director in promoting European and British film market. Daily supervision of receptionist, account clerk and two office clerks.

The requirements for the position are a B.S. or foreign equivalent in Administration and Business Management and five years of experience in the job offered or five years of experience in administrative management of business. The Employer's Other Special Requirements are:

1. Working knowledge of acting profession in Europe.
2. Working knowledge of modeling, acting, and talent professions and industries.
3. Working knowledge of London entertainment business.

The CO remanded the application for labor certification to the State Office on August 26, 1993 (AF 271, 298). The CO remanded the application for two reasons: (1) the SVP for an Administrative Assistant is two to four years; the Employer is requiring seven years; and, (2) there is nothing in the file to document the Employer's activities in Europe. Additionally, the CO directed the State Office to check State corporate records to see if the Employer is registered as a corporation and is paying proper taxes.

The Employer was incorporated in the State of Arizona on September 8, 1992 (AF 294). By letter dated October 5, 1993, the Employer stated that she would like to develop and expand film activities in England and Europe as she does not currently have any film activities in those areas (AF 273-274). The Employer also contended that she requires five years of experience rather than two years because of the nature of the business; two years does not sufficiently train someone to work competently with actors, entertainers, models, and agents.

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued a Notice of Findings on December 21, 1993 (AF 261-264), proposing to deny certification on three grounds. First, the CO questioned whether, according to § 656.50 (now recodified as § 656.3), there is a current job opening to which U.S. workers can be referred. Second, the CO found that the Employer's requirements of a BA plus five years of experience and European working knowledge appear to be unduly restrictive in violation of § 656.21(b)(2)(i)(A) as they are not normally required for successful performance of the job in the U.S. Lastly, the CO found that seven U.S. applicants were rejected for other than valid, job-related reasons in violation of § 656.21(b)(6) and/or § 656.21(j)(1)(iii) and (iv). Additionally, the CO found that 19 U.S. applicants possessed the education, training, and/or experience to perform the usual requirements of the offered position and should have been considered qualified for the position pursuant to § 656.24(b)(2)(ii).

Accordingly, the Employer was notified that it had until January 25, 1994, to rebut the findings or to cure the defects noted. The Employer requested an extension of time to submit rebuttal on January 11, 1994 (AF 260), which was granted until February 9, 1994, on January 20, 1994 (AF 259).

In her rebuttal, submitted under cover letter dated February 4, 1994 (AF 34-258), the Employer contended that any U.S. worker could have gained the specific knowledge and experience required for this position by traveling, studying, or working in Europe. Regarding the restrictive requirements cited by the CO, the Employer contended that the offered position requires an employee who has all of the qualifications specified in the job announcement which was submitted to, accepted by, and published by the State Office. Additionally, the Employer cited the regulations at § 656.24(a)(2)(ii) that, "The Certifying Officer shall . . . consider a U.S. worker . . . except that, if the application involves . . . an alien whom the Certifying Officer determines to be currently of exceptional ability in the performing arts, the U.S. worker must be at least as qualified as the alien." Lastly, the Employer contended that "99.999 per cent of the applicants had few (in total or combinations) of the qualifications advertised for in the areas of modeling and acting training skills."

The CO issued the Final Determination on April 21, 1994 (AF 32-33), denying certification because there does not appear to be a position which is clearly open to U.S. workers as required by § 656.50 (now recodified as § 656.3), the requirements for the position are unduly restrictive, and because of the failure of the Employer to give due consideration to the rejection of six U.S. applicants who indicate combinations of education, training, and/or experience qualifying for the usual requirements of the occupation.

On May 5, 1994, the Employer requested review of the Denial of Labor Certification (AF 30-31). In November 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer submitted a brief in support of her petition for review on June 23, 1994 (AF 9-19).

By letter dated May 16, 1995, the Alien advised that she had purchased the Employer's business and has obtained her employment license.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*).

The requirements for a job opportunity, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States and shall be those defined in the DOT. See § 656.21(b)(2)(i). Requirements for a position that are defined for the job by the DOT are not unduly restrictive. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*). Therefore, it must first be determined if the job duties listed by the Employer are included within the CO's designated job description of an Administrative Assistant. It must then be determined if the Employer's experience requirements fall within the Specific Vocational Preparation (SVP) requirements.²

The DOT lists the overall duties of an Administrative Assistant (DOT Code 169.167-010) as:

Aids executive in staff capacity by coordinating office services, such as personnel, budget preparation and control, housekeeping, records control, and special management studies: Studies management methods in order to improve workflow, simplify reporting procedures, or implement cost reductions. . . Studies methods of improving work measurements or performance standards. Coordinates collection and preparation of operating reports. . . issues and interprets operating policies. Reviews and answers correspondence. May assist in preparation of budget needs and annual reports of organization. May interview job applicants . . . plan training programs. . . . May compile store and retrieve management data, using computer.

In comparison, the duties listed by the Employer on the ETA Form 750-A include the following:

Establish and manage all administrative functions of business including personnel, accounting, finance and computer systems in support of company operations, assist talent director in organizing and running client workshops, interviews, training sessions, and rehearsals. Assist director in promoting European and British film market. Daily supervision of receptionist, account clerk and two office clerks.

(AF 268). The DOT is not to be applied in a pigeonhole fashion where there must be a complete matching of duties between the job offered and the DOT classification in order for a job to be appropriately classified. *Trilectron Industries, Inc.*, 90-INA-176 (Dec. 19, 1991). Therefore, we

² Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. This training may be acquired in a school, work, military, institutional, or vocational environment.

find that the CO properly classified this job opportunity, as all of the duties except promoting European and British film market, are included in the job description for the Administrative Assistant position.

The SVP level of an Administrative Assistant is seven, which establishes an educational/experience requirement from two to four years. This denotes the period of time required to learn the techniques, acquire information, and develop the facility needed for average performance in a specific job. *See* Appendix D to the DOT, page 473. Thus, the CO correctly found that the Employer's requirements of a Bachelor's Degree plus five years of experience does not fall within the guidelines set by the SVP level. Subsequently, the case was remanded so that the Employer could submit additional documentation to justify these requirements (AF 271).

In response, the Employer made several arguments regarding the SVP requirement for an Administrative Assistant of two to four years (AF 274-75). The Employer noted that a Bachelor's Degree plus five years of experience is necessary because of the nature of the business. She further noted that,

[T]wo years of experience in this business simply does not train someone sufficiently to competently work with actors, entertainers, models, and agents. The talent and modeling contracts are complex, the lingo and industry terms are constantly changing, styles and formats of auditions and modeling are always going through evolutions. I would not possibly trust my business, my reputation, and all of the responsibilities with an assistant who has just two years experience.

In the NOF the CO continued to find that the Bachelor's Degree plus five years of experience requirements are unduly restrictive and a preference for the Employer's convenience rather than a business necessity (AF 262). As such, the CO informed the Employer that it could modify its requirements in accordance with this finding, justify its requirements by showing business necessity or show that the requirements are common for this occupation in the United States. To show business necessity, the CO informed the Employer that it must document that "the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties." *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989). The CO further found that the requirement for a working knowledge of the acting profession in Europe and the London entertainment business is unduly restrictive and, therefore, instructed the Employer to submit a business plan indicating the feasibility of entering into the European market in accordance with *Mouren-Laurens*, 91-INA-236 (August 11, 1992).

Regarding the business necessity of the education and experience requirements, the Employer makes three main arguments in its rebuttal submission (AF 37-38). First, the Employer argued that the job described was accepted by the Arizona Department for Economic Security. Second, the Employer argued that, in accordance with § 656.24(a)(2)(ii), the Alien should be considered to have exceptional ability in the performing arts. Third, the Employer notes that this job opportunity is not for an ordinary administrative assistant's job, as it was originally described as an Administration Analyst and European Coordinator.

In the FD, the CO continued to find these requirements unduly restrictive (AF 33). We agree. First, we note that determinations made by local agencies are not binding. *Aeronautical Marketing Corp.*, 88-INA-143 (Aug. 4, 1988). Therefore, the fact that the Arizona Department for Economic Security accepted the Employer's job requirements has no bearing in this case. Second, we agree with the CO in that, if the Employer wishes to seek certification for aliens of exceptional abilities in the performing arts, she must file a new petition under § 656.21(a) or Schedule A. Finally, the Employer argued that the job opportunity is not for an ordinary administrative assistant and, therefore, her requirements are justified. The Employer noted that the job could not be done without business/client contacts. The Employer attached letters from a variety of people that have come into contact with the Alien and submitted sample projects coordinated for her business along with a daily log (AF 48-258). We have no doubt that the Alien is a well-liked, hard-working professional and, although the documentation is impressive, it does not show the business necessity of the Employer's job requirements as required by the regulations regarding alien labor certification. The fact that a more experienced worker would be better and would enhance the quality of the business is insufficient to establish business necessity. *Venture International Associates, Ltd.*, *supra*. Furthermore, stating the Alien's qualifications and experience upon rebuttal does not constitute documentation of business necessity for the unduly restrictive requirements. *Phyllis Kind Gallery, Inc.*, 93-INA-56 (Oct. 13, 1993). As such, we find that the Employer has not shown that the job requirements of a Bachelor's Degree plus five years of experience bear a reasonable relationship to the occupation in the context of the Employer's business or that they are essential to perform, in a reasonable manner, the job duties as required by *Information Industries*.

As noted above, the CO also found the requirement that the applicant possess knowledge of the European entertainment communities is unduly restrictive. Therefore, the CO requested that the Employer submit a business plan indicating the feasibility of entering into the European market in accordance with *Mouren-Laurens*, *supra*. The Board in that case held that, where an employer makes a reasonable showing of its intent to undergo significant expansion, requiring the creation of a new position, a *bona fide* job opportunity exists and labor certification may be granted. *H.R. Enterprises, Inc.*, 89-INA-279 (June 25, 1990). Similarly, if the Employer in this case can make a reasonable showing that her business is about to expand to the European market, her job requirements will be deemed established as a business necessity. However, in order to secure labor certification under such circumstances, the Employer must prove that it indeed has definite plans for business expansion, and that the expansion will generate full-time, permanent work. See *Remington Products, Inc.*, 89-INA-173 (Jan. 9, 1991) (*en banc*) (foreign language requirement may be justified by plans for expansion of business into foreign market).³

In response to the CO's request, the Employer submitted a brief and vague Action Plan which included the following statement defining the scope of the plan, "to develop a market in the European arena utilizing our present business operations model with the addition of expert staff

³ We do not doubt that the Employer in this case is offering full-time, permanent work; however, we fail to recognize the business necessity for the requirement that the applicant possess knowledge of European acting and entertainment communities.

(Maureen) that are cognizant of the scenario pursuant to our aims.” (AF 98).⁴ Although the Employer may have plans to expand to the European market in the future, she has not met her burden of showing definite plans for such an expansion. Vague rebuttal documentation will not meet the employer’s burden of establishing business necessity. *Analysts International Corp.*, 90-INA-387 (July 30, 1991). Therefore, we find that the Employer has not met her burden of establishing the business necessity for the knowledge of European acting and entertainment communities.⁵ As such, we find that the Employer has not established the business necessity of the education and experience requirements, as well as the requirement that the applicant have knowledge of European entertainment communities. Therefore, it is unnecessary to address whether there is a *bona fide* job opportunity and whether the Employer lawfully rejected the U.S. applicants. Accordingly, the CO’s denial of labor certification is hereby **AFFIRMED**.⁶

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of July, 1997, for the Panel.

RICHARD E. HUDDLESTON
Administrative Law Judge

⁴ In her Request for Review, the Employer argued that she “provided volumes of supporting documents showing its past and present business with the European acting and entertainment communities.” Upon thorough review of the record, we disagree with this statement. The Employer has shown that the Alien has contacts with European acting and entertainment communities; however, the record fails to establish specific business connections between the Employer’s business and the European entertainment community.

⁵ In its Request for Review, the Employer stated that, “for the CO to dismiss the need for the international experience is to say in effect, that the employer cannot expand her business to an international level.” We disagree with this statement. Employers can expand their businesses freely; however, when seeking to hire an alien and thereby obtain a labor certification for such alien, the Employer must document that its job requirements, such as those at issue here, are justified by business necessity and not merely an employer preference.

⁶ We note that, subsequent to the CO’s issuance of the FD, the Alien informed the Board that she has purchased the Employer’s business and is currently employing U.S. citizens. However, according to § 656.27(c), the Board “shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made, the request for review, and any Statements of Position or legal briefs submitted.” Therefore, this information has not been considered in forgoing decision. However, we note that § 656.50 states that employment is defined as meaning permanent, full-time work by an employee for an employer **other than oneself** (emphasis added). Therefore, since the Alien owns the corporation, an employer-employee relationship, as required by the labor certification regulations, no longer exists. As such, had this transaction taken place while the case was before the CO, this would have been a clear ground for denial.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.